INDEX

	Page
Opinion below	1
Jurisdiction	2
Statute involved	2
Questions presented	2
Statement	3
Argument	8
Conclusion	16
Appendix	17

CITATIONS

Cases:

American Power & Light Company v. *S.E.C.*, 329 U. S. 90	4
Edelstein, et al. v. *S.E.C.*, No. 687, October Term, 1950	8
Electric Bond and Share Co., In re, Civ. Action No. 33-343 (S.D. N.Y. Nov. 5, 1945)	6
Electric Bond and Share Co., In re, 73 F. Supp. 426	6, 11
Federal Liquidating Corp. v. *S.E.C.*, No. 686, October Term, 1950	8, 10, 15
Niagara Hudson Corp. v. *Levintritt*, 340 U. S. 336	13
Otis & Co. v. *S.E.C.*, 323 U. S. 624	9
Pennsylvania Edison Company, In re, 176 F. 2d 764	12
S.E.C. v. *Central-Illinois Securities Corp.*, 338 U. S. 96	6, 7, 9, 12, 14, 15

Statutes:

Public Utility Holding Company Act, 49 Stat. 803, 15 U.S.C. 79 *et seq.*:	
Section 11	17
Section 11(b)(2)	17
Section 11(e)	2, 3, 5, 10, 18

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 700

ELECTRIC BOND AND SHARE COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, WILLIAM F. STUBERFIELD, *et al.*, ALFRED B. CORNELL, *et al.*, AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINION BELOW

Since the petition for a writ of certiorari was filed immediately after the record was brought from the District Court to the Court of Appeals and before the Court of Appeals had an opportun-

ity to consider the issues or to render judgment, there is no opinion of the Court of Appeals. The opinion of the District Court is reported at 95 F. Supp. 492 (R. 4). The findings and opinion of the Commission dated July 28, 1950, have not been officially reported but are set forth in Holding Company Act Release No. 9980 (R. 36).

JURISDICTION

The order of the District Court, a part of which is sought to be reviewed, was entered on March 2, 1951 (R. 16). Petitioner invokes the jurisdiction of this Court under 28 U. S. C. 1254, made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U. S. C. Section 79y.

STATUTE INVOLVED

The pertinent sections of the statute involved, 11(b)(2), and 11(e) of the Public Utility Holding Company Act, are set forth in an Appendix, *infra,* pp. 17-19.

QUESTIONS PRESENTED

1. Whether, in measuring the rights of the $6 preferred stockholders pursuant to plans calling for the retirement of their stock under Section 11(e) of the Public Utility Holding Company Act, the Commission erred in holding that such stockholders were entitled to receive sums equivalent to their investment value on a going concern basis rather than a sum specified in the corporate charter to be payable upon "liquidation, dissolution or

winding up of the affairs of the corporation or any distribution of its capital, whether voluntary or involuntary."

2. Whether the District Court erred in holding that there was substantial evidence to support the Commission's appraisal of the investment value of the $6 preferred stock.

3. Whether it was in accordance with the "fair and equitable" standard of Section 11(e) of the Public Utility Holding Company Act to award preferred stockholders, deprived of $10 during the pendency of the litigation, compensation computed at a rate measured by the yield they had been receiving upon the investment value of their stock.

STATEMENT

Petitioner seeks a writ of certiorari to review a portion of an order of the United States District Court for the Southern District of New York enforcing a plan filed with the Securities and Exchange Commission pursuant to Section 11(e) of the Public Utility Holding Company Act. The plan, designated as Plan II-B, was the third in a series of plans concerned with retiring the two series of preferred stock of Electric Bond and Share Company (Bond and Share), and satisfying the rights and claims of the holders thereof.

Bond and Share, a registered holding company, is a New York corporation. It was the apex of a pyramid of holding companies and operating companies forming, at one time, the largest public

utility holding company system in the world. Bond and Share owned debt or stock securities, or both, of five subsidiary holding companies: American & Foreign Power Company (Foreign Power), American Gas and Electric Company (American Gas), American Power & Light Company (American), Electric Power & Light Corporation (Electric), and National Power & Light Company (National). In addition, it owned directly interests in various operating companies in the system.[1]

Early in 1940 the Commission instituted the first of a number of Section 11 proceedings directed to Bond and Share and its subsidiaries in the course of which it soon became apparent that the Bond and Share System would have to be sharply contracted if it was to meet the requirements of that section. The Commission, *inter alia,* entered orders directing the liquidation of Bond and Share's intermediate holding companies, American and Electric, which were upheld by this Court in *American Power & Light Company* v. *Securities and Exchange Commission,* 329 U.S. 90. The process of divestment, undertaken by Bond and Share in order to comply with the act, resulted in accumulating large amounts of cash, part of which was used, pursuant to Commission approval,

---

[1] See Table II (R. 65) in the Commission's opinion for a list of these companies and the book value of the Bond and Share holdings as of December 31, 1946.

to purchase on the open market and retire some of the preferred stock of Bond and Share (R. 40-41).

On July 25, 1945, Bond and Share filed three plans, designated as Plans I, II, and III, under Section 11(e) of the Public Utility Holding Company Act in an effort to bring the capital structure of the company into compliance with the Act. At that time Bond and Share had no debt outstanding but had 840,268 shares of preferred stock entitled to $6 per share cumulative dividends annually, 203,012 shares of preferred stock entitled to $5 per share cumulative dividends annually, and 5,250,-357.66 shares of $5 par value common stock (R. 42). Except for a $1 difference in dividend preference the $6 and $5 Preferred Stocks have identical rights. Each had a preference of $100 a share upon liquidation or other distribution of capital and was callable at the option of the company at any time at the redemption price of $110 per share plus accrued dividends (R. 399, 400).

Plan I provided that, as an initial step in the retirement of these issues, Bond and Share would make a pro rata payment of $30 per share to all preferred stockholders and that their rights to dividends and capital would be modified to reflect this payment. In approving this plan the Commission found the elimination of the preferred stocks from the Bond and Share capital structure necessary to effectuate the provisions of Sections 11(b), and the United States District Court for the South-

ern District of New York approved and enforced this determination.[2] No appeal was taken.

Plan II-A (which replaced the earlier Plan II) provided for the payment to both the $5 and $6 preferred stocks of $70 per share plus accumulated dividends, in cash, and the issuance of a certificate entitling the holder to such additional amount, if any, as might be ultimately awarded by the Commission or the courts. This plan was approved by the Commission and enforced by order of the United States District Court for the Southern District of New York on December 20, 1946 (R. 258).[3]

Plan III, which provides for certain other dispositions by Bond and Share, is not relevant to these proceedings.

On April 7, 1947, Bond and Share filed its Plan II-B. Initially, this plan provided that no further payments be made to the preferred stockholders. While the proceedings were pending before the Commission the case of *S. E. C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 was argued before this Court. Since that case appeared to involve comparable issues no determination was made by the Commission pending its decision. The *Central-Illinois* opinion was issued on June 27, 1949, and Bond and Share immediately requested

---

[2] *In re Electric Bond and Share Co.*, Civil Action No. 33-343 (S. D. N. Y. Nov. 5, 1945).

[3] *In re Electric Bond and Share Co.*, 73 F. Supp. 426 (S. D. N. Y. 1946).

leave to file with the Commission supplemental briefs and present another oral argument in the light of that opinion. Leave was granted, briefs were filed and another argument was heard.

On July 19, 1950 the Commission issued its order approving that portion of Plan II-B which provided for no further payment to the $5 preferred stock but disapproving that portion of the plan limiting the $6 preferred stock to the $100 payment already received. The Commission determined that each $6 preferred share should be paid an additional $10, together with compensation for the delay in payment at the rate of 5.45 per cent per annum. The rate (5.45%) was computed, in accordance with the *Central-Illinois* formula, by the relationship between $6, the annual dividend, and $110, the investment value.

In its opinion the Commission reviewed the voluminous evidence of the investment value of the preferred stock presented by the interested parties, and on the basis of the whole record decided that the $6 preferred stock had an investment value of at least $110. The Commission found it unnecessary to determine more precisely what the investment value was in view of the provision in the charter which would have permitted Bond and Share to redeem these shares for that sum. Bond and Share thereupon filed amendments to its Plan II-B to conform it to the directions of the Com-

mission but reserved the right to object to these amendments before the courts.

The Commission then applied to the District Court for an order approving the amended plan and enforcing its provisions. Over the objections of Bond and Share, representatives of certain $5 preferred shareholders, and a common stockholder, the District Court granted the Commission's request.

Cross-appeals have been filed by Bond and Share and the $5 preferred stockholders.

ARGUMENT

1. Petitioner urges that this Court consider, prior to decision by the Court of Appeals, the issues raised by its appeal from the order of the district court, arguing that the primary issue is substantially the same as the primary issue presented in *Federal Liquidating Corp.* v. *S. E. C.* and *Edelstein, et al.* v. *S. E. C.*, Nos. 686 and 687, this Term. We agree that there is a close relationship between the primary legal issues in the two cases. We are filing a separate brief in opposition to the petitions in Nos. 686 and 687, in which we state our reasons for believing that there is no novelty in the issues and that the court below correctly determined that investment value, rather than the charter liquidation preference, is the proper measure of the preferred stockholders' rights in a plan of liquidation in compliance with Section 11 of the Holding

Company Act. This Court is respectfully referred to that brief for a more complete analysis of the issue involved.

The Commission's order in this case is based on the same principle as that upheld in the *Central-Illinois* case, as well as in the earlier decision in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, namely, that the proper measure of preferred stockholders' rights in a solvent company, when compelled to surrender their investment under a Section 11 (e) plan, is the investment value of their stock on a going concern basis rather than its charter liquidation preference.

The charter provision relied upon by petitioner in this case is Section 3 (b) which provides:

> In the event of any liquidation, dissolution or winding up of the affairs of the corporation or any distribution of its capital, whether voluntary or involuntary * * * each holder of the $6 preferred stock * * * shall be entitled * * * to be paid on each share of such stock held by him the sum of $100 * * *. After such payment * * * the remaining assets and funds of the corporation * * * shall be divided and distributed among the holders of the Common Stock. [R. 399-400.]

Bond and Share does not dispute that Section 11 (b) of the Holding Company Act compelled the retirement of its preferred stock, and indeed it specifically invoked the powers of the Commission and the district court under Section 11 (e) to effect

piecemeal retirement of its preferred stock in a manner not authorized by the charter. It urges, however, that apart from the compulsions of the Act it would have been prompted by business reasons to retire its preferred stock and could have done so under its charter by a payment of only $100 per share. In the Commission's view, even assuming the facts, this would be immaterial to the question of whether "investment value" or the charter provisions are controlling under Section 11 (e) of the Act. However, the alleged probability of the retirement of the preferred stock, not under compulsion of the Act and for independent business reasons, was considered by the Commission as one factor affecting the investment value of the preferred stock. The Commission therefore considered the evidence offered and rejected the factual basis for the contention that business reasons unrelated to the compulsions of Section 11 would have led Bond and Share to retire, without refunding, its preferred stocks (R. 54). The District Court held that this finding was based on substantial evidence (R. 15). As to this point the decision rests upon considerations generally similar to those involved in the *Federal* case, although of course upon different evidence.

The district court rejected Bond and Share's interpretation of what the charter provision in question would require if the petitioner had sought to retire its preferred stock pursuant to its charter. The District Judge held that "even if Bond and

Share had, as a matter of business judgment apart from the Act, sought to retire the preferred, it could not have done so under § 3 (b) but would have had to do so under § 3 (e)" (R. 9), the provision of the charter permitting retirement of the preferred by redemption at $110 per share (R. 400-402).

Thus, the question involved in the *Federal* case, whether the charter liquidation provision is controlling, is not reached unless this Court disagrees with the decision of the District Judge as to what the charter would have permitted in the absence of the Holding Company Act.[4]

2. A further difficulty is presented by the suggestion that this Court grant certiorari at this stage in the case, since petitioner here is only one of the appellants in the court below and the other appellant has raised issues which would not necessarily be determined by a decision on the issues here involved.

An appeal is pending in the Court of Appeals for the Second Circuit on behalf of Bond and Share's $5 preferred stock, which was found by the Commission and the district court to have an in-

[4] In addition, the decision of Judge Leibell in approving Plan II-A seems to foreclose any such argument as Bond and Share makes with respect to the controlling weight which should be assigned to its charter liquidation provision. Judge Leibell expressly held, and it must be taken as the law of the case, that the preferred stock was being retired: "* * * not in any of the ways specified in the charter, but in accordance with the plans which cut across the charter provisions." *Electric Bond and Share Co.*, 73 F. Supp. 426, 446. (R. 293)

vestment value of only $100 per share. That appellant apparently will urge that the evidence required a higher valuation for the $5 preferred. A grant of the instant petition would thus require this Court to pass upon questions of fact with respect to one class of preferred stock while similar issues not concluded by the determination of this Court with respect to the other class might remain pending in the Court of Appeals.

3. Petitioner's objection to the Commission's order awarding compensation for delay presents a minor and insubstantial issue. Having found the fair investment value of the $6 preferred stock to be $110 per share, the Commission was required, under all the cases thus far decided, to award these stockholders compensation for delay in payment at a rate "which approximates the favorable rate of return they received on their preferred stock."[5] In accordance with the formula adopted in the *Central-Illinois* case, which was approved by this Court (338 U. S. 96, 152-155), the Commission held that the rate of compensation should be $6 per annum divided by the investment value of $110 per share, or 5.45 per cent. Any lower rate would deprive the $6 preferred stockholders of the full

[5] *S. E. C. et al.* v. *Central-Illinois Securities Corporation et al.*, 338 U. S. at 145, 155. See also *In re Pennsylvania Edison Company*, 176 F. 2d 764, 769 (C. A. 3, 1949). Similar compensation for delay in payment was also awarded in the *Federal* case, and no objection was raised although the dissenting judge in the Court of Appeals in that case construed the escrow agreement there involved to require no payments in excess of the money set aside by that agreement.

return upon their investment and thus be inconsistent with the finding of fair investment value.

4. Petitioner criticizes the financial analysis from which the Commission derives its conclusions as to the investment value of the $6 preferred stock.[6] This raises merely a question of judgment as to which this Court has indicated that great weight should be given to the Commission's conclusion. See *Niagara Hudson Corp.* v. *Levintritt,* 340 U. S. 336, 346-347.

Petitioner argues that the Commission erred in taking into account prospective earnings from subsidiaries where there were dividend arrears on the preferred stocks and consequent blocks to payment on Bond and Share's holdings of common stock pending consummation of reorganizations. The Commission considered the whole record in its analysis and made detailed findings with regard to both the assets and earnings coverages of the preferred stocks. With respect to both coverages, it analyzed them on both a system and a corporate basis. With respect to system earnings, the Commission analyzed past, current, and prospective earnings coverages for the preferred stocks as of the time they were retired. The Commission did not assume that Bond and Share's subsidiaries, then in process of reorganization, had actually

[6] Petitioner's suggestion that the Commission's findings respecting the investment value of the $6 preferred stock "are not supported by substantial evidence on consideration of the record as a whole" is not developed at this time and accordingly we are not in a position to discuss it. (Pet. 32-33).

been reorganized, but did include the prospect of such reorganizations as factors to be considered in estimating prospective earnings. Consideration of such factors was necessary to reach an intelligent conclusion as to the prospective earnings that would have been available for the preferred stocks of Bond and Share if they had remained outstanding. Bond and Share's own expert testified that the use of the plans on file at the time of his testimony was "as good a way of appraising what kind of a reorganization there might have been in its overall effect, although it might have been apart from the impact of the Act, as any other way that I can think of" (R. 392-393). Accordingly, the Commission assumed, in its analysis of system earnings, that the three plans on file would be consummated in substantially the form in which they had been submitted.[7]

This analytic technique did not, as Bond and Share contends, violate any rule of the *Central-Illinois* case. The "present liquidation or reorganization required by the Act" which must be omitted from the valuation process is the elimination of Bond and Share's own corporate securities. It does not, as this Court made clear, require the reconstitution of the system as it would have existed if the Act had not been passed (338 U. S. 96, 140-143). Nor does it, we believe, require the Commis-

[7] This assumption was borne out by the two reorganizations which have been consummated thus far.

sion to ignore pending plans which may assist it in its valuation process.

Bond and Share further contends that the Commission was required to ignore these earnings because the Act compels Bond and Share to divest itself of the stock in the subsidiary holding companies. Obviously, divestment of the holdings of Bond and Share in American, Electric, and Foreign Power involves not a forfeiture of the values inherent in such holdings, but the realization of equitable equivalents. The Commission properly evaluated the holdings; Bond and Share would, in effect, almost disregard them.

Finally, Bond and Share contends that the Commission erroneously used as a basis for determining investment value "a period of abnormally high market values of a transient nature." (Pet. p. 31) A similar contention was advanced and rejected in the *Central-Illinois* case.

CONCLUSION

The decision of the District Court is correct an
no question is presented which would warrant re
view by this court. Accordingly the petition fo
certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General

JOHN F. DAVIS,
Special Assistant to th
Attorney General

ROGER S. FOSTER,
General Counsel,

MYRON S. ISAACS,
Chief Counsel,
Division of Public Utilities.

MYER FELDMAN,
Attorney,

Securities and Exchange Commission

MAY, 1951

APPENDIX

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, 49 Stat. 820, 15 U. S. C. 79k

Sec. 11.

* * * * *

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such

company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

* * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equit-

able to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 946190 938